Other Authorities Cited

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S. Rep. No. 752, 79th Congress, 1st Session (1945)	6
5 U.S.C. Section 1009(e)	5, 6, 7
28 U.S.C.:	
Section 1336	6n
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29 U.S.C. Section 160(e)	5

IN THE

Supreme Court of the United States

October Term, 1966

No. 526

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION;

and

GREAT NORTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; SPOKANE INTERNATIONAL RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; SOUTHERN PACIFIC COMPANY; AMERICAN POTASH & CHEMICAL CORPORATION; and STAUFFER CHEMICAL COMPANY,

Appellants,

v.

SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION), a Crown Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

OPPOSITION TO MOTION TO AFFIRM

Preliminary Statement

The Jurisdictional Statements present to the Court the substantial question of an improper remand that would, if allowed to stand, prevent the Interstate Commerce Commission from performing the functions delegated to it by Congress in passing on the merits of a complaint of undue prejudice. Such result is

so repugnant to this Court's delineation of the boundaries of judicial review as to impel the United States, the Commission, and the railroad and shipper intervenors to apply for summary reversal of the judgment of the district court insofar as it would preclude the Commission from further considering the right of the undue prejudice complainant to relief. The court below, in its supplemental opinion, stated: "It is not intended that the Commission receive additional evidence on the right of the plaintiff to be granted such relief." Its amended judgment ordered the matter "remanded to the Commission for further proceedings with instructions to grant relief to the plaintiff". For reasons detailed below (p. 3), no appeal has been taken on the merits of the district court's decision. As in *Arrow Transportation Co. v. Cincinnati, N.O. & T.P.R.*, 379 U.S. 642, the court is asked, without disturbing the ruling below on the merits, to remove the restraint on the Commission's power to re-examine the issue, imposed by the remand. In neither of its opinions did the District Court suggest any reason for departing from the established practice, in the case of ascertained error, of remanding to the Interstate Commerce Commission for further proceedings consistent with the decision of the court. This deficiency is not supplied by the Motion to Affirm; appellee submits neither decisional authority nor persuasive reasons to support the action of the court below in issuing a restrictive remand.

I. Quantum of proof of water competition

In this case the railroad carriers and the supporting shippers proved to the satisfaction of the Commission that the rate differences complained of existed by reason of the threat of water competition which faces the rail carriers at California origins. The court below, dealing item by item with the estimated cost of water competition, dismissed as "speculation" evidence which had satisfied the Commission as to the availability of water service. The district court held that a firm commitment by a water carrier was necessary to prove water competition and that the quotations obtained by the shippers did not suffice. Such a requirement (i.e., evidence of a firm commitment) had not previously been enunciated in a court or commission decision involving undue prejudice. In enumerating the kinds of evidence it deemed necessary to a showing of water competition, the district court cited no other court decisions.

Because the question is one of mixed fact and law of a peculiarly intricate nature, the railroad and shipper appellants have chosen not to appeal the court's formulation of standards for determining when competition is a sufficiently real threat to justify reduced rail rates published to meet it. However, appellants believe they should have an opportunity to meet the evidentiary requirements laid down by the court, and they believe the Commission is entitled, in dealing with the railroad rate structure, to know whether such requirements can be met on the facts of this case.

II. Appellee has addressed its argument to the wrong issue

Appellee misinterprets appellants' position in stating (Motion to Affirm, p. 4) that

> ". . . it is grossly incorrect to suggest a court may never limit the nature or scope of the agency proceeding upon remand . . ."

At no time did appellants suggest that a court, on remand, may *never* limit the nature or scope of future agency proceedings. On the contrary, the statement of the question presented (JS, pp. 2-3) and the description of the issues involved (JS, p. 7) emphasized that the essence of the question presented to the Commission was "whether an undue or unreasonable preference or prejudice exists on the facts of this case". Resolution of this issue requires analysis and weighing of complex transportation conditions such as makes evaluation of these factors a matter within the special competence of the Commission.

III. Cases cited by appellee support appellants' position

In practical effect, all four cases relied on by appellee as authority for restrictive remands are instances where the reviewing courts *requested* further agency action on the merits in order to avoid making decisions properly reserved for agency determination. The action of the reviewing court in these cases was thus consistent with the position of appellants herein. It

is noteworthy that two of the cases cited by appellee (*Ford Motor* and *Morand Brothers*) involve the National Labor Relations Board and statutory provisions for judicial review that are wholly distinguishable from those governing Interstate Commerce Commission orders. 29 U.S.C. Section 160(e) provides that the court, on review of N.L.R.B. action, may modify the agency's decision and that its judgment and decree shall be final (subject to appeal to the higher courts). In *Coppus Engineering Corp.* v. *N.L.R.B.*, 240 F. 2d 564 (C.A. 1—1957) it was held that, where findings of N.L.R.B. are not supported by substantial evidence, the reviewing court has exclusive jurisdiction to make and enter a decree modifying and enforcing as so modified the order of the Board as provided by 29 U.S.C. Section 160(e). An altogether different provision for statutory review of Interstate Commerce Commission orders is found in 28 U.S.C. Section 2321 which describes the authority of the reviewing court as "to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money . . .".

IV. The Administrative Procedure Act supports appellants' position

Appellee invokes 5 U.S.C. Section 1009(e) in support of the district court's remand, describing this as a case of "agency action unlawfully withheld or unreasonably delayed" (Motion to Affirm, p. 10). But the district court based its decision solely on what it deemed to be a lack of substantial evidence to support

the Commission's findings. This is acknowledged by the appellee who states (Motion to Affirm, p. 7):

> ". . . the only conclusion was that the record . . . did not support the findings necessary to appellants' asserted defense."

The Administrative Procedure Act, in such a case, provides (5 U.S.C. 1009(e)):

> ". . . the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusion, found to be unsupported by substantial evidence . . ."*

Authority to set aside agency action is manifestly not authority to make new and contrary findings, to decide on the merits an issue entrusted to the agency for determination, or to foreclose the agency's discretionary power to grant further hearings. That Section 1009(e) was not designed to limit the administrative function of the agency is indicated by its legislative history. The Senate report states that this section was

> ". . . not intended to confer any non-judicial functions or to narrow the principle of continuous administrative control enunciated by the Supreme Court in *Pottsville.*" (S. Rep. No. 752, 79th Congress, 1st Session (1945).)

Subsequent case law repels the view that under this section the reviewing court may assume the discretionary authority of the agency. In *J-T Transport Co.* v. *U.S.*, 185 F. Supp. 838 (1960), the three-judge

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* This dovetails perfectly with the statutory provisions defining the scope of judicial review of I.C.C. decisions. 28 U.S.C. 1336, 1398, 2284, 2321-2325.

district court specifically denied that a reviewing court could, under Section 1009(e), compel an agency to effectuate a particular result. The I.C.C. had denied plaintiff's application for motor carrier authority. The court stated:

> "Plaintiff urges that we compel action by the I.C.C. unlawfully withheld upon the application of plaintiff, and requests that we direct the I.C.C. to issue plaintiff a permit authorizing it to perform the transportation recommended by the Examiner. We have no such power. Courts of review have no power to order an administrative body to perform discretionary acts in a particular manner or themselves to exercise administrative functions (citing cases)." (p. 851)

Action withheld may be ordered by the reviewing court, but denial of relief sought does not constitute action unlawfully withheld. *State Airlines, Inc.* v. *CAB,* 174 F. 2d 510 (1949). To hold otherwise would have the effect of nullifying the basic function of the agency and make of it a mere conduit for the purpose of taking evidence, substituting ultimately the judgment of the court for that of the agency.

Conclusion

Appellee, by its Motion to Affirm, would have this Court sanction an unprecedented assumption of power by the reviewing court at the expense of the agency's authority to exercise regulatory powers entrusted to it by the law. In *Arrow Transportation Co.* v. *Cin-*

cinnati N.O.&T.P.R., supra, a case not challenged or distinguished by appellee, this Court prevented such assumption of power. A similar result, it is submitted, should be directed here.

Respectfully submitted,

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Certificate of Service

I, ARTHUR A. ARSHAM, attorney for Stauffer Chemical Company, one of the appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of October, 1966, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with air-mail postage prepaid, to Robert W. Ginnane, its General Counsel, at the offices of the Commission, Washington, D. C. 20423.

2. On Mrs. Betty Jo Christian, Attorney for the Interstate Commerce Commission, who represented the Commission in the appeal for which review is sought herein, by mailing a copy, in a duly addressed envelope, postage prepaid, to the offices of the Commission, Washington, D. C. 20423.

3. On the Solicitor General, by mailing a copy, in a duly addressed envelope, with air-mail postage prepaid, to the Department of Justice, Washington, D. C. 20530.

4. On Saskatchewan Minerals, a Crown corporation, plaintiff in the action and appellee herein, by mailing copies in a duly addressed envelope, with air-mail postage prepaid, to its attorneys of record, Robert Baronsky, Esq., and Wayne W. Wright, Esq., Beresford & Booth, 700 Olympic National Life Building, Seattle, Washington 98104.

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